A **KUAN CHEE JON & ORS v. SSF CONSTRUCTION SDN BHD**

HIGH COURT MALAYA, IPOH
HAYATUL AKMAL ABDUL AZIZ JC
[CIVIL SUIT NO: 22NCVC-63-03-2013]
1 AUGUST 2016

B

CONTRACT: *Agreement – Loan agreement – Parties entered into sale and purchase agreement ('SPA') to contra settlement for loan agreement – Whether SPA collateral and existed side by side with loan agreement – Whether SPA security for loan agreement – Whether indication of moneylending transaction – Allegation*
C *that loan agreement was not signed and not finalised – Whether unsigned loan agreement binding on parties – Whether agreements legal and enforceable – Whether there was unjust enrichment in claim for damages*

MONEYLENDERS: *Unlicensed moneylender – Unenforceable contract – Parties entered into sale and purchase agreement ('SPA') to contra settlement for loan*
D *agreement – Whether SPA collateral and existed side by side with loan agreement – Whether SPA indication of moneylending transaction – Whether SPA legal and enforceable – Whether security for friendly loan cloaked as SPA*

The first to third plaintiffs entered into a loan agreement with the defendant
E for a sum of RM3 million ('the loan'). The fourth plaintiff alleged that he was the nominee of the first to third plaintiffs and as a settlement for the said loan, the defendant agreed to 'contra' to him three properties. To facilitate the contra, the fourth plaintiff entered into a sale and purchase agreement ('SPA') for the properties and the total purchase price was RM6.5 million. The
F fourth plaintiff later discovered that the defendant sold the properties to another party without his knowledge and consent. This prompted the plaintiffs to file an action against the defendant on the grounds, *inter alia*, that (i) the loan agreement was not signed by the parties and not yet finalised; and (ii) the damages suffered by the plaintiffs, as evinced by a valuation report of the properties, were in the sum of RM6.9 million. In refuting the
G plaintiffs' contentions, the defendant argued that (i) the plaintiffs' action was based on a loan agreement for a sum of RM3 million; (ii) the fourth plaintiff failed to prove that any of the purchase price was paid to the defendant; and (iii) the fourth plaintiff relied on a loan agreement which was never produced as an exhibit in court and therefore, the plaintiffs failed to prove their case.
H The defendant exhibited an unsigned copy of the purported loan agreement. The Senior Assistant Registrar ('SAR') ordered an assessment of damages. Hence, the present appeal. The issues that arose for determination were (i) whether the unsigned loan agreement was binding on the parties; and (ii) whether the SPA was enforceable.

I

Held (dismissing appeal with costs; affirming decision of SAR):

(1) Even though the loan agreement was not formally signed by the parties, they had nevertheless conducted themselves in accordance with the terms and conditions of the said loan agreement. The SPA was collateral to and existing side by side with the loan agreement and the transaction between the parties was obviously a money lending transaction unsanctioned under the money lenders legislation which rendered whatever agreement entered into as void. (paras 24 & 26)

(2) The SPA signed between the fourth plaintiff and the defendant was not a normal transaction as could be found in any SPA. The fourth plaintiff did not submit any documentary evidence to support that the purchase price of RM6.5 million for the said properties was paid by him to the defendant. The intention of the parties was clear that the said properties were intended as a collateral to the loan agreement and not to be treated as a contra as alleged by the fourth plaintiff. (paras 31 & 34)

(3) The sale and purchase transactions were not SPA *simpliciter* as in reality, it was a security for a loan. It had all the indication of a moneylending transaction often practiced by those not licensed to do so. The SPA was merely a sham agreement and it was all the while intended to be a security for the loan. The transactions were rendered void by law. A written agreement is a sham where it incorporate clauses by which neither party intends to be bound and which is obviously a smoke screen to cover the real intentions of both contracting parties. (paras 36 & 38)

(4) Illegal contracts are unenforceable. There was unjust enrichment on the part of the fourth plaintiff pursuant to the purported SPA of the properties by gaining RM6.9 million. The defendant did not plead illegality. It only wanted to pay the plaintiffs what was rightfully due to them. The remedy in the form of restitution would be able to restore the benefit back to its rightful owner. (para 40)

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Bristol, Cardiff and Swansea Aerated Bread Co v. Maggs (1890) 44 Ch D 616 ***(refd)***

Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors [1994] 1 CLJ 19 HC ***(refd)***

Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah [2007] 1 CLJ 498 CA ***(refd)***

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal [2009] 4 CLJ 329 FC ***(refd)***

Fira Development Sdn Bhd v. Goldwin Sdn Bhd [1989] 1 CLJ 1; [1989] 1 CLJ (Rep) 32 SC ***(refd)***

Heilbut Symons & Co v. Buckleton [1913] AC 30 ***(refd)***

Ho Weng Leong v. Ng Kee Chin [1996] 1 LNS 89 HC ***(refd)***

Hussey v. Horne-Payne [1879] 4 App Cas 311 ***(refd)***

A *International Islamic University Malaysia v. Omar Jamaluddin & Ors [2010] 1 LNS 543 HC* ***(refd)***
Kluang Wood Products Sdn Bhd & Anor v. Hong Leong Finance Bhd & Anor [1994] 4 CLJ 141 HC ***(refd)***
Lau Brothers & Co v. China Pacific Navigation Co Ltd [1965] 1 LNS 210 ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***
B *Ong Thean Chye & Ors v. Tiew Choy Chai & Anor [2011] 1 CLJ 674 CA* ***(refd)***
Orix Credit Malaysia Sdn Bhd v. Mohd Ikbal Ismail & Anor [2010] 1 LNS 1942 HC ***(refd)***
Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 FC ***(refd)***

C **Legislation referred to:**
Contracts Act 1950, s. 66
Evidence Act 1950, s. 114(g)
Rules of Court 2012, O. 18 r. 11, O. 37, O. 56 r. 1

For the plaintiffs - Oh Teik Keng; M/s Oh Teik Keng & Partners
D *For the defendant - Tharmalingam Karuppannan; M/s Robert & Assocs*

Reported by Najib Tamby

JUDGMENT

E **Hayatul Akmal Abdul Aziz JC:**

Introduction

[1] This is the fourth plaintiff's appeal (encl. 37) against the decision of the learned Senior Assistant Registrar ("SAR") for assessment of damages dated 2 November 2015.

F

[2] The cause papers for purposes of the application before the learned SAR in this appeal were as follows:

(a) the writ of summons and statement of claim dated 5 March 2013 ("encls. 1 and 2 respectively");

G

(b) plaintiffs' affidavit affirmed by Gan Cheng Koh (fourth plaintiff) dated 4 August 2014 ("encl. 21");

(c) defendant's affidavit in reply affirmed by Chew Chee Bor dated 19 August 2014 ("encl. 22");

H

(d) plaintiffs' affidavit in reply affirmed by Gan Cheng Koh (fourth plaintiff) dated 9 September 2014 ("encl. 23");

(e) defendant's affidavit in reply affirmed by Chew Chee Bor dated 30 September 2014 ("encl. 24").

I **[3]** Enclosure 37 was heard by this court on 26 May 2016. After duly perusing the affidavits and the respective written submissions of the parties filed herein and upon hearing learned counsel for the plaintiffs and the

defendant, encl. 37 was dismissed with cost of RM5,000 and this court affirmed the decision of the learned SAR. Aggrieved with the said decision the fourth plaintiff has now filed an appeal against the whole of the said decision with the Court of Appeal.

Brief Facts

[4] The fourth plaintiff alleged that he is the nominee of the first, second and third plaintiffs, though no cogent evidence was adduced herein to substantiate the same save and except for the bare averment of the said fourth plaintiff as regards to the same. The defendant is a company registered under the Companies Act 1965. On 7 January 2011, the first, second and third plaintiffs entered into a loan agreement ("the loan agreement") with the defendant for a sum of RM3,000,000 ("the said loan"). The fourth plaintiff alleged that as a settlement for the said loan, the defendant has agreed to "contra" to him three lots of properties ("the said properties").

[5] The fourth plaintiff alleged that to facilitate the above contra, he and the defendant had entered into a sale and purchase agreement ("SPA") dated 7 January 2011 for the said properties and the total purchase price of the sale and purchase agreement was RM6,500,000 (exh. A - encl. 21). The purported paper transaction of the said properties are as follows:

(i) RM 2,500,000.00, sebuah rumah berkembar 31/2 tingkat, Parcel No 40 Jenis TH 1A, dipegang di bawah Hakmilik Induk H.S.(D) 46211, No P.T 27424, Mukim Ampang, Daerah Hulu Langat dan Negeri Selangor Darul Ehsan dan berukuran 298 meter persegi; dan

(ii) RM 2,500,000.00, sebuah rumah berkembar 31/2 tingkat, Parcel No 50 Jenis TH 1A, dipegang di bawah Hakmilik Induk H.S.(D) 46211, No P.T 27424, Mukim Ampang, Daerah Hulu Langat dan Negeri Selangor Darul Ehsan dan berukuran 298 meter persegi; dan

(iii) RM 1,500,000.00, sebuah rumah "link" 31/2 tingkat, Parcel No 109 Jenis TH 4, dipegang di bawah Hakmilik Induk H.S.(D) 46211, No P.T 27424, Mukim Ampang, Daerah Hulu Langat dan Negeri Selangor Darul Ehsan dan berukuran 290 meter persegi.

[6] According the story of the fourth plaintiff, sometime in 2011, it came to his knowledge that the defendant had apparently sold the said properties to another party without the knowledge and consent of the fourth plaintiff. On 14 March 2013, the plaintiffs then filed a writ of summons and statement of claim against the defendant that was duly served by AR post unto the defendant. The required affidavit of service as proof of service dated 22 March 2013 was filed on 26 March 2013. The record showed that the defendant had failed to enter his appearance and also failed to file his statement of defence within the time period as allowed under the rules.

[7] On 10 April 2013 the plaintiffs applied for and judgment in default of appearance was entered against the defendant. On 24 September 2013, the defendant applied to set aside the judgment in default. However on 20 March

2014 the application to set aside the judgment in default was dismissed by the learned Judicial Commissioner at that time with cost of RM2,000 awarded to the plaintiffs.

The Plaintiffs' Submission

[8] The plaintiffs submitted that since the loan agreement was not signed by the parties and not yet finalised hence the loan agreement is highly prejudicial with no probative value and failed to comply with the best evidence rule. The agreements that are applicable in the plaintiffs' case against the defendant are the SPA for the said properties.

[9] The plaintiffs argued that cl. 25 in all of the said SPA provides:

> 25. Time for delivery of vacant possession
>
> (1) Vacant possession of the said Parcel shall be delivered to the Purchaser in the manner stipulated in Clause 26 within thirty-six (36) calendar months from the date of this Agreement.

[10] Learned counsel for the plaintiffs submitted that the word "shall" carry the meaning of mandatory and referred to the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329; [2009] 4 MLJ 149 where it was decided that "Even if the word 'must' is to be construed as having the same effect as 'shall', nevertheless it still makes compliance with the prerequisites mandatory". Learned counsel for the plaintiffs further submitted that the defendant had failed to transfer the titles to the fourth plaintiff and introduced a new term that the SPA was signed as a collateral for the said loan. It was further submitted that there are no terms in the SPA that stated the said SPA was signed as a collateral for the said loan.

[11] It was also argued by the plaintiffs that they have exhibited the valuation report dated 4 June 2014 for the said properties (exh. "D" - encl. 21). The present value of the properties 5(i) and 5(ii) are at RM2,650,000 each and the property 5(iii) is valued at RM1,600,000 which brings the total value to RM6,900,000. Hence it is the contention of the plaintiffs that the damages suffered by them is RM6,900,000. Counsel for the fourth plaintiff however, submitted that since the defendant had paid the plaintiffs RM1,924,500 therefore the amount of damages due to the fourth plaintiff is RM4,975,500.

The Defendant's Submission

[12] The defendant submitted that the plaintiffs' action against the defendant was based on a loan agreement dated 7 January 2011 for a sum of RM3,000,000. The defendant admitted that he took the said loan but however alleged that he didn't receive the full amount and had instead only received a sum of RM2,200,000 from the plaintiffs. The defendant submitted that if it is at all true that the said properties was meant to be a contra then

the balance of RM800,000 owing by the plaintiffs has to be paid to the defendant. The defendant in turn, submitted that the amount of RM800,000 was deducted as administrative fees and finds support in the averment made by the first plaintiff Kuan Chee Jon's affidavit dated 9 October 2013 (exh. CCB-2 - encl. 22), (affidavit in reply to the defendant's application to set aside the JID entered against the defendant on 10 April 2013), para. 11 reads as follows:

> Merujuk kepada perenggan 11 Affidavit tersebut, saya menyatakan bahawa atas persetujuan Defendan, Plaintif telah menolak sejumlah wang sebanyak RM800,000.00 daripada jumlah pinjaman tersebut sebagai kos-kos pentadbiran dan "disbursement" yang dialami Plaintif di bawah pinjaman tersebut dan perkara ini adalah dalam pengetahuan Defendan.

[13] The defendant further submitted that, even though the SPA was dated 7 January 2011, it was only stamped more than a year later on 19 July 2012 with no indication of any penalty paid for late stamping as is normally the procedure and practice at the stamping office. All the above facts supported the contention by the defendant that the said properties were meant to be a collateral for the loan agreement rather than a contra as alleged by the plaintiffs.

[14] The defendant submitted that the plaintiffs had also failed to prove that payment for the said properties was duly made and received by the defendant from the fourth plaintiff. The defendant alleged that the letter dated 7 March 2011 that were exhibited as "exh. B" in the fourth plaintiff's affidavit (encl. 21) was referring to SPA dated 28 December 2010 and not to the SPA dated 7 January 2011 (the present case). The defendant submitted that the fourth plaintiff had failed to prove any of the purchase price was paid by the fourth plaintiff to the defendant.

[15] The defendant submitted that the fourth plaintiff is relying on a loan agreement which was never produced as an exhibit in court and therefore the plaintiffs had failed to prove their case. The defendant on the other hand had exhibited the unsigned copy of the purported loan agreement in their affidavit (exh. CCB-1- encl. 22) and consequently requested for the court to invoke s. 114(g) of the Evidence Act and submitted that, had the fourth plaintiff produced the said loan agreement, it certainly would have injured the plaintiffs' case.

[16] The defendant averred that he had paid (the loan agreement) back the plaintiffs a sum of RM1,931,936 (encl. 22 - exh. CCB-3) and the balance owing to the plaintiffs is only RM268,064 and not RM6,900,000 as alleged by the fourth plaintiff. To this argument, the defendant finds support in the averment made by the first plaintiff Kuan Chee Jon's affidavit dated 9 October 2013 (exh. CCB-2 - encl. 22), (affidavit in reply to the defendant's application to set aside the JID entered against the defendant on 10 April 2013) para. 6 as follows:

A Merujuk kepada perenggan 7 Affidavit tersebut, saya menyatakan bahawa wakil Defendan, Chew Keng Chee telah menghubungi saya dan memberitahu bahawa dia berniat menyelesaikan pinjaman tersebut dengan Plaintif-Plaintif dan saya telah memberitahu bahawa sekiranya pinjaman tersebut diselesaikan sebelum, pengurusan kes pertama, Plaintif akan memberhentikan tindakan ini terhadap Defendan.

B The defendant submitted that the JID entered against them was for the loan agreement and the balance owing to the plaintiffs is only RM268,064 and not RM6,900,000 as alleged by the fourth plaintiff.

Findings Of The Court

C *Issues before this court:*

(a) whether the unsigned loan agreement dated 7 January 2011 is binding on parties; and

(b) whether the sale and purchase agreement dated 7 January 2011 is D enforceable.

[17] This appeal is a rehearing pursuant to O. 56 r. 1 of the Rules of Court ("RC") 2012; see *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241, FC.

E **[18]** At the outset it is to be reminded that the matter before this court today is for assessment of damages based on the JID that was entered by the plaintiffs against the defendant. This court refers to the case of *Cheng Hang Guan & 2 Ors v. Perumahan Farlim (Penang) Sdn Bhd & 3 Ors* [1994] 1 CLJ 19 where the High Court held:

F The general rule as to the measure of damages is that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation. When a plaintiff claims damages from a defendant he has to show that the loss in respect of which he claims damages was caused by the defendant's G wrong and also that the damages are not too remote to be recoverable. And the plaintiff must prove their damage. Where precise evidence is obtainable the Court naturally expects to have it, where it is not, the Court must do the best it can. General difficulty of proof does not dispense with the necessity for proof.

H In other words, for assessment of damages, the plaintiffs in this present case have to show and to prove that the damages claimed against the defendant are not too remote to be measured and legitimately quantifiable and recoverable.

[19] It is also to be judicially emphasised that the judgment giving rise to I this assessment for damages is in respect of a judgment in default of appearance where the merits and legitimacy of the subject matter of the suit

had never been fully and satisfactorily ventilated by the court. A judgment in default is not a judgment on the merits, but it is the expression of the coercive power of the court where the judgment was entered by a failure to follow any of the procedures or orders of the court. Accordingly, no appeal lies against a default judgment, but the court has power to set it aside or to vary it. (See *Fira Development Sdn Bhd v. Goldwin Sdn Bhd* [1989] 1 CLJ 1; [1989] 1 CLJ (Rep) 32; [1989] 1 MLJ 40, SC). In the circumstances, where the judgment is given for damages to be assessed, it shall proceed with the necessary adaptations, production of witnesses and evidence, the said assessment will follow the proceedings at a trial as required by the O. 37 of the RC 2012, in order to ascertain the measure and legitimacy of damages that shall be allowed by the court.

[20] In this regard, in the present case before this court, there are clearly two conflicting versions by the parties. The fourth plaintiff submitted that the said properties were intended to contra off the defendant's loan pursuant to the said loan agreement. The fourth plaintiff claimed, being a nominee to the first, second and third plaintiffs (with no proof adduced to substantiate such claim), is seeking damages from the defendant, allegedly suffered by the failure of the defendant to transfer the said properties to the fourth plaintiff. While the defendant on the other hand submitted that the said properties were meant to be taken as collateral to the loan agreement that he took from the plaintiffs and certainly was not to be taken to contra the said loan as submitted by the fourth plaintiff. Despite the loan agreement was for RM3,000,000, the defendant averred that he had only received RM2,200,000, out of which he had paid back the plaintiffs RM1,931,936 leaving a balance of RM268,064 only due to the plaintiffs.

[21] The facts of the case would show that the plaintiffs did not deny that the defendant took a loan from them for an amount of RM3,000,000. The first plaintiff averred that the amount RM800,000 was deducted for administrative fees but the plaintiffs failed to explain why was there a need for an administrative fee and why it was so exorbitantly high. The plaintiffs had never denied the averment by the defendant that the defendant had paid (the loan) an amount of RM1,931,936 and the balance amount owing to the plaintiffs is only RM268,064. It is settled law that when party fail to rebut the averment in any affidavit those specific averments are deemed admitted. (See *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609).

[22] The fourth plaintiff submitted that the loan agreement was never signed by the parties and hence it is not the best evidence available and the court has to accept the SPA that was executed by parties. Hence the issues.

Whether The Unsigned Loan Agreement Dated 7 January 2011 Is Binding On Parties

[23] The plaintiffs in their submission raised the issue that since the loan agreement was not signed by the parties and has yet to be finalised, therefore, the loan agreement is highly prejudicial with no probative value and failed

to comply with the best evidence rule. It was submitted that the agreement that would be applicable in the plaintiffs' case against the defendant has to be the SPA for the three said properties. The defendant on the other hand submitted that the plaintiffs' claim against him was based on a loan agreement dated 7 January 2011 and since the plaintiffs had failed to produce the said loan agreement, the defendant had invoked the adverse inference under s. 114(g) of the EA against the plaintiffs.

[24] This court finds that even though the loan agreement was not formally signed by parties, the parties nevertheless had conducted themselves in accordance with the terms and conditions of the said loan agreement. This court also finds that the SPA of the said properties are regarded as collateral to the making of the loan agreement which is the main agreement. The role of the court in constructing a contract was accepted and explained in 1913 by Lord Moulton in *Heilbut Symons & Co v. Buckleton* [1913] AC 30 at 47:

> It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will give you one hundred pounds', is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract.

[25] In *Kluang Wood Products Sdn Bhd & Anor v. Hong Leong Finance Berhad & Anor* [1994] 4 CLJ 141, it was held that that there must be a representation that was relied upon in the signing of the contract that was collateral to and existing side by side with the main contract. The Court of Appeal in *Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah* [2007] 1 CLJ 498, Gopal Sri Ram JCA (as he then was) in delivering the judgment of the court (p. 499) said:

> On the facts, there was a concluded contract despite the want of a duly executed formal agreement. There was an offer by the appellant and acceptance by the 1st respondent, and there was consideration, certainty of parties, certainty of price and certainty of property. Also, there were the unequivocal acts of part performance by the 1st respondent which were referable to an existing contract between the parties. The acts of part performance in the present case were the payment of the deposit coupled with the RM5,000 meant for the squatters. Although it was true that no formal contract of sale and purchase was ever executed, that did not matter since there could be a concluded contract even where the parties contemplated the execution of a more formal document. The appellant's argument that this was a case where the execution of the formal written agreement was condition precedent to there being a contract was unacceptable. The appellant's own evidence that the appellant would readily accept the balance of the purchase price even without a formal agreement being executed by the parties pointed to the formal agreement being an unimportant document to the contracting parties. So, objectively speaking, the parties had already made a contract and the written agreement was a mere formality.

In *Lau Brothers & Co v. China Pacific Navigation Co Ltd* [1965] 1 LNS 210; [1965] 1 MLJ 1, the Federal Court held that the whole series of the documents between the parties are to be taken into consideration to ascertain whether the parties have come to a binding agreement. Following *Bristol, Cardiff and Swansea Aerated Bread Co v. Maggs* (1890) 44 Ch D 616 at p. 622 Kay, J referred to that part of Lord Cairn's judgment in *Hussey v. Horney-Payne* [1879] 4 App Cas 311 which read:

> It is one of the first principles applicable to a case of the kind, that where you have to find your contract, or your note or memorandum of the terms of the contract in letters, you must take into consideration the whole of the correspondence which has passed. You must not at one particular time draw a line and say, 'we will look at the letters up to this point and find in them a contract or not, but we will look at nothing beyond'. In order fairly to estimate what was arranged and agreed, if anything was agreed between the parties you must look at the whole of that which took place and passed between them.

In *International Islamic University Malaysia v. Omar Jamaluddin & Ors* [2010] 1 LNS 543; [2010] MLJU 1648, VC George J (as he then was) aptly explained the meaning of the word "contract" in these words:

> To constitute a valid contract there must be separate and definite parties thereto; those parties must be in agreement, that is there must be a *consensus ad idem*; those parties must intend to create legal relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises and as clear and helpful an enunciation of the principles as any which should guide the Court in determining the ever recurring question of whether there has been a contract between the parties is provided by Saville J in *Vitol B.V. v. Compagnie Europeene des Petroles* [1988] 1 Lloyd's Rep. 574, at 576 in the following words: The approach of the English law to questions of the true construction of contracts of this kind is to seek objectively to ascertain the intentions of the parties from the words which they have chosen to use. If those words are clear and admit of only one sensible meaning, then that is the meaning to be ascribed to them - and that meaning is taken to represent what the parties intended. If the words are not so clear and admit of more than one sensible meaning, then the ambiguity may be resolved by looking at the aim and genesis of the agreement, choosing the meaning which seems to make the most sense in the context of the contract and its surrounding circumstances as a whole. In some cases, of course, having attempted this exercise, it may simply remain impossible to give the words any sensible meaning at all in which case they (or some of them) are either ignored, that is to say, treated as not forming part of the contract at all, or (if of apparent central importance) treated as demonstrating that the parties never made an agreement at all, that is to say, had never truly agreed upon the vital terms of their bargain.

[26] Anchored on these authorities, this court finds that on the basis of the evidence adduced before this court and looking intently into the circumstances of the case as whole, it is safe to conclude that the said SPA was collateral to and existing side by side with the main contract

(loan agreement) and the transaction between the parties is obviously a moneylending transaction unsanctioned under the moneylenders legislation which render whatever agreement entered into as void.

[27] This court refers to s. 66 of the Contracts Act 1950 that provides for the applicability of the doctrine of restitution. It states as follows:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

[28] In the instant case, the defendant who had borrowed a sum of RM3,000,000 but was only given RM2,200,000 while RM800,000 was deducted by the plaintiffs as administrative fees for the loan. That notwithstanding, the defendant is still expected to pay back in full the RM3,000,000 loan taken. The defendant had successfully paid back a sum of RM1,931,936 which leaves a balance of only RM268,064 due to the plaintiffs for the RM2,200,000 received by the defendant. Section 66 (*supra*) would apply to return the parties to their *status quo* prior to the loan transaction. However, in the instant case, restitution was not pleaded by the defendant (because they never had the opportunity to do so when the application to set aside the JID was rejected by this court at that time). However, it is to be noted here that, the requirements of O. 18 r. 11 of the Rules of Court 2012 makes it clear that it is not mandatory to raise a point of law (see *Ho Weng Leong v. Ng Kee Chin* [1996] 1 LNS 89; [1996] 5 MLJ 139). A plain reading of this rule makes it clear that a point of law need not be pleaded as the language in r. 11 is permissive rather than mandatory.

[29] In the case of *Orix Credit Malaysia Sdn Bhd v. Mohd Ikbal Ismail & Anor* [2010] 1 LNS 1942, a lending transaction was similarly held to be void and unenforceable as the plaintiff did not hold the requisite license under the Moneylenders Act 1951 nor prove to have been granted any exemptions under the Act. The High Court applied s. 66 of the Contracts Act 1950 in favour of the plaintiff (lender) and dismissed the objection of the defendant that restitution had not been pleaded by the plaintiff. Abang Iskandar Abang Hashim HCJ (as His Lordship then was) said:

> In this kind of situation, section 66 of the Contracts Act 1950 would of necessity apply to remedy an injustice that could be occasioned to the Plaintiff when the P5 (term loan agreement) was subsequently found to be unenforceable by virtue of section 15 of the Moneylenders Act 1951.

Indeed, restitution was ordered even when the issue of s. 66 was not raised by the parties but invoked by the courts upon discovery of the invalidity of the relevant contractual documents after the commencement of court proceedings. It is therefore sufficient for a pleading to contain only the facts relied upon, and need not state the legal effect of the facts. The legal result of the pleaded facts itself need not be pleaded (see *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331).

Whether The Sale Purchase Agreement Dated 7 January 2011 Is Binding On Parties

[30] As was mentioned earlier, this court finds that the SPA of the said properties are regarded as collateral to the making of the loan agreement. As was held in *Kluang Wood Products Sdn Bhd v. Hong Leong Finance Berhad & Anor* (*supra*), that there must be a representation that was relied upon in the signing of the contract that was collateral to and existing side by side with the main contract. As this court has observed that the details of the said properties was stated in the second schedule of the loan agreement and this court has also decided that the said SPA are collateral that exist side by side with the loan agreement rather than a contra.

[31] This court finds that the SPA signed between the fourth plaintiff and the defendant are not a normal transaction as can be found in any SPA. This court finds that the fourth plaintiff didn't submit any documentary evidence to support that the purchase price of RM6,500,000 for the said properties was paid by him to the defendant. The fourth plaintiff had only exhibited three letters allegedly to be from the defendant confirming that the purchase price for the said properties was paid by the fourth plaintiff to the defendant. This court finds that the defendant was correct when he made the averment in his affidavit that these letters referred to SPA dated 28 October 2010 whereas the SPA that was alleged to be entered by the fourth plaintiff and the defendant were dated 7 January 2011. Hence this court finds that the fourth plaintiff had failed to prove its allegation that the defendant had acknowledged that the fourth plaintiff had paid the full purchase price of the said properties.

[32] The question arose whether the documents executed by the parties were in reality a security for a friendly loan cloaked as a sale purchase agreement. This court perused the loan agreement entered between parties and finds that the loan agreement is an interest free debt as provided under cl. 2.01 of the loan agreement and the due date is 10 February 2011 (refer the first schedule). Clause 4.01(a) and (b) of the loan agreement further provide that the amount payable is RM3,000,000 and upon payment by the debtor of the said debt there is no other amount whatsoever due from the debtor to the creditor.

[33] Upon further perusal of the said loan agreement (at p. 10), it is found that in the event the debtor fails to settle the debt on or before the due date provided always the debtor shall be at liberty to dispose of any or all of the properties to any party with all proceeds of such sale to be paid to the creditor. The second schedule of the loan agreement specifically provides that all of the said properties are to be taken, read and construed as an essential part of the loan agreement. This court opines that clearly the said properties are taken as collateral for the said loan.

[34] This court therefore discerns that the intention of parties is clear at all material time that the said properties were intended as a collateral to the loan agreement and not to be treated as a contra as alleged by the fourth plaintiff. There are some unusual features in the SPA that militate against the argument that it was a contra. First, as submitted by learned counsel for the fourth plaintiff, there was full payment made by the fourth plaintiff to the defendant and exhibited three letters of acknowledgement allegedly from the defendant to the fourth plaintiff without him adducing evidence of the actual monetary transaction as regard to the purchase price taking place. Second, the fourth plaintiff failed to give any cogent evidence or explanation other than it was a contra contrary to the contents of the documents itself. Third, under normal circumstances, it would be expected that any reasonable purchaser would have taken all steps to protect his interest and immediately seek the registration of the transfer of the said properties in order to protect the interest of the purchaser. In the present case such haste was not present, and as a matter fact it was after more than a year for the fourth plaintiff to stamp the SPA and/or took any actions to assert possession over the said properties. It really does not take a genius to look through the charade and see the transaction for what it really is, ie, a moneylending transaction with the said properties as collateral.

[35] The defendant's explanation was that the SPA was just a temporary security or collateral until the loan is paid. Here the defendant's version has a ring of truth in that the said properties was meant to be taken as a security for the loan and not as a pure SPA *simpliciter*. It is expected that the plaintiffs would prefer not to want the loan agreement to be stamped and made official for fear that they might be hauled up by the authorities for having committed an offence of illegal moneylending if it can be shown that they were into doing this as a business and not a once-off friendly loan transaction. The plaintiffs do not have a moneylending license. The transaction might be set aside and the moneylending transaction being declared null and void. The fourth plaintiff would want this court to believe that he paid cash for the properties and that the defendant had acknowledged receipt of it. One is of course permitted to proffer the question why there were no evidence of purchase price been paid in cheque or a telegraphic transfer. Obviously it is merely to masked the fact that there was no money exchanging hands. In fact, one would have expected the fourth plaintiff's solicitors to immediately take custody of the title and to quickly send the memorandum of transfer (MOT) for adjudication so that when the notice of assessment of stamp duty is out, the MOT duly signed and stamped could be presented for registration of the transfer of the said properties into the fourth plaintiff's name at the Land Office. This court fails to understand how the above was not done expeditiously and neither was a private caveat entered to protect the purchaser's interest.

[36] It would be most peculiar in the circumstances for the defendant to merely settle for RM2,200,000 (from the RM3,000,000 loan) when the three properties sold could fetch RM6,500,000 (at that time). All the facts as exposed strongly points to the conclusion that the sale purchase transactions are not sale and purchase agreement *simpliciter* as in reality it is a security for a loan. It has all the indication of a moneylending transaction often practised by those not licensed to do so. The SPA was merely a sham agreement and it was all the while intended to be a security for the said loan of RM3,000,000. The arrangement of the parties was that once the defendant had fully repaid the said loan, the said lands would be transferred back to the defendant. A written agreement is a sham where it incorporates clauses by which neither party intends to be bound and which is obviously a smokescreen to cover the real intentions of both contracting parties.

[37] As the facts had revealed, despite the loan agreement was for RM3,000,000 and the defendant had only received RM2,200,000 due to the plaintiffs making a deduction of RM800,000 as an administrative fee for the loan transaction. From the total amount of RM2,200,000 that the defendant had received, it had successfully paid back the plaintiffs RM1,931,936, leaving a balance of RM268,064 only due to the plaintiffs. Since the loan agreement is now an illegal contract, the application of s. 66 of the Contracts Act 1950 would see to it that the plaintiffs ought to be reimburse in the sum of RM268,064 being the rightful balance owing by the defendant to the plaintiffs.

[38] It is this court's considered view that the transaction between the parties is clearly a moneylending transaction and the plaintiffs having no licence to lend money to the defendant or anyone for that matter seeks refuge under the SPA to make an unjust enrichment. That being the case, the said transaction is rendered void by law.

[39] Applying the equitable maxim that equity looks to the intent rather than the form, this court would always look beyond the surface and structure and go to the substance of the subject matter, beyond the covering and cloak to the core. Otherwise unscrupulous elements would be able to pull off a sham agreement, taking cover under a camouflage of carefully crafted documents designed to conceal the truth of the matter. In *Ong Thean Chye & Ors v. Tiew Choy Chai & Anor* [2011] 1 CLJ 674; [2011] 4 MLJ 616), Court of Appeal said that the courts will not enforce contracts which are tainted with illegality. Courts too will not lend its aid to enforce pretended obligations. Only real obligations will be enforced.

[40] The general principle is that illegal contracts are unenforceable. There was unjust enrichment on the part of the fourth plaintiff pursuant to the purported sale and purchase agreement of the said land by gaining RM6,900,000. Unjust enrichment will usually take the form of a benefit

A accruing to one party which may be regarded as belonging to another. In such a situation the remedy in the form of restitution would be able to restore the benefit back to its "rightful owner". The defendant had not pleaded illegality neither has he led any evidence to show that the plaintiffs are in the business of moneylending. He only wanted to pay the plaintiffs what was rightfully
B due to them (encl. 22).

Conclusion

[41] In light of the foregoing analysis and the grounds as set out, this court dismissed this appeal with cost of RM5,000 to the defendant and the decision
C of the learned SAR is affirmed.

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